Submitted Jany 24, 1876 1-536 Judge Davis Aff'd

TRANSCRIPT OF RECORD.

Supreme Court of the United States.

No. 869

Samuel B. Lower, the Supervisor; Allen S. Walters, the Town Clerk, and Samuel B. Lower and Perry F. Remsburg, the Justices of the Peace, of the Town of Ohio, in the County of Bureau and State of Illinois, Plaintiffs in Error,

vs.

United States of America on the relation of George O. Marcy, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

~~FILED OCTOBER , 1875.~~

Filed 11th December, 1875.

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Samuel B. Lower, the Supervisor; Allen S. Walters, the Town Clerk, and Samuel B. Lower and Perry F. Remsburg, the Justices of the Peace, of the Town of Ohio, in the County of Bureau and State of Illinois, Plaintiffs in Error,

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United States of America on the relation of George O. Marcy

vs.

Samuel B. Lower, the Supervisor; Allen S. Walters, the Town Clerk, and Samuel B. Lower and Perry F. Remsburg, the Justices of the Peace, of the Town of Ohio, in the County of Bureau and State of Illinois.

Pleas in the circuit court of the United States for the Northern District of Illinois, held at the United States Court Rooms, in the city of Chicago, in the District aforesaid before the judges thereof on Thursday the eighth day of April, in the adjourned March Term of said court, in the year of our Lord one thousand eight hundred and seventy-five and of our Independence the ninety-ninth year.

WILLIAM H. BRADLEY, Clerk.

United States of America, on the relation of George O. Marcy
vs.
Samuel B. Lower, the Supervisor, Allen S. Walters, the Town Clerk, and Samuel B. Lower and Perry F. Remsberg, the Justices of the Peace, of the Town of Ohio, in the county of Bureau and State of Illinois.

Northern District of Illinois.—ss.

Be it remembered that on the 5th day of March, A. D. 1875, came the said plaintiff, the United States of America, on the relation of George O. Marcy, by its attorneys, Messrs. Paddock and Ide, and filed in the office of the Clerk of the Circuit Court of the United States for the Northern District of Illinois, at Chicago, in the district aforesaid, its bond for costs and at the same time filed its petition for a writ of mandamus against said defendants, except Perry F. Remsburg, in said entitled cause which said bond and said petition are respectively in the words and figures following to wit:

BOND FOR COSTS.

United States of America, }
Northern District of Illinois, } ss.

Circuit Court, March Term, A. D. 1875.

United States of America, ex. rel.; Geo. O. Marcy
vs
Samuel B. Lower, Allen S. Walters and S. B. Lower, the Supervisor, Town Clerk and Justice of the Peace, constituting the Board of Auditors of the Town of Ohio, in Bureau county, Illinois. } In Mandamus.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against our property for any costs taxed against him. Dated this 5th day of March, A. D. 1875.

PADDOCK & IDE.

(Endorsed.)
Filed March 5th, A. D. 1875.

WM. H. BRADLEY, Clerk.

PETITION FOR WRIT OF MANDAMUS.

Northern District of Illinois.—ss.

United States Circuit Court,
March Term, A. D. 1875.

To the Honorable Judge of said Court:

Respectfully represents unto your Honor, your petitioner, George O. Marcy, a citizen of the State of Massachusetts, that on to wit: the 12th day of March, A. D. 1873, at the March Term, 1873, of said Circuit Court, your petitioner, in a certain suit at law, wherein he was plaintiff and the Town of Ohio, in the county of Bureau and State of Illinois and said district, was defendant, did recover in said court a judgment against said town in the sum of forty-two hundred and eighty-six dollars and sixty cents damages with his costs in that behalf, expended, amounting to the sum of two hundred and twenty-eight dollars and seventy cents, as will more fully appear by the record of said judgment now remaining in said court, and to which your petitioner refers for greater certainty.

Your petitioner further represents that said Town of Ohio, is now, was at the time of the rendition of said judgment and ever since, to wit: the year 1850, has been a municipal corporation, created and existing and acting under and by virtue of the public laws of said State, commonly called the Township Organization Laws; that by the first section of article 13 of an act of the General Assembly of said State, entitled, "An act to revise the law in relation to township organization," in force March 4, 1874, and by which act since the passage thereof the said town of Ohio has been controlled, it is provided, that in each town the supervisor, town clerk and justices of the peace of the town shall constitute a board of auditors which shall consist of no less than three persons and that it shall be the duty of said Board of Auditors to meet at the town clerk's office for the purpose of examining and auditing the town accounts; semi-annually on the Tuesday next preceding the annual town meeting and on the Tuesday next preceding the annual meeting of the County Board, which annual town meeting is fixed by said act to be holden on the first Tuesday in April in each year, and the annual meeting of the County Board on the second Tuesday in September in each year; further, that by said article 13 it is also made the duty of said Board of Auditors to examine and audit all claims and charges against their town, among which charges, by force of section six of article five of said act, judgments against the town are embraced, and to make a certificate to be signed by a majority of the said Board, specifying the nature of the claim or demand, and to whom the amount is allowed, and to cause such certificate to be delivered to the town clerk of said town, the aggregate amount of said claims allowed by said Board being required by said act to be certified to the county clerk of said county within which said town is situated, at the same time and in the same manner as other amounts required to be raised for town purposes, to be levied and collected as other town taxes, except that in towns mentioned in section 4 of article 4 of said act, the amount is required to be certified to the county Board who shall include the same in their estimate of the town expenses; within which exception your petitioner avers the said town of Ohio is not included, and your petitioner further shows that the moneys necessary to defray the said town charges shall be levied on the taxable property in each town, in the manner prescribed in the act of said General Assembly for raising revenue and other moneys for state and county purposes and expenses.

Your petitioner further represents that the cause of action upon which

said judgment was rendered consisted of certain coupons or interest warrants, representing annual interest accrued on bonds purporting to have been issued by said town of Ohio, under and by virtue of an act of said General Assembly, entitled, "An act to amend an act entitled 'an act to incorporate the Illinois Grand Trunk Railway," in force March 25th, 1869; and that by the second section of said act it is provided that "it shall be the duty of the proper authorities of any city, town or township issuing bonds as aforesaid to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accuring thereon; and to levy such taxes as may be necessary therefor, as other taxes are levied by them."

And your petitioner further represents that on to wit: the first day of September, A. D. 1874, and ever since the Board of auditors of said town of Ohio consisted and still consists of S. B. Lower, the supervisor; Allen S. Walter, the town clerk, and S. B. Lower, justice of the peace of said town; and that on said first day of September, 1874, the said judgment and costs remaining due and unpaid, excepting the sum of fifteen hundred dollars paid and applied thereon on said day and year, and still belonging to your petitioner. Your petitioner did present to said Board of auditors and each member thereof a sworn statement of his said claim, less said payment against said town accompanied by an affidavit that said claim and the balance thereof after allowing and crediting said payment was correct, just and unpaid, and also delivered to the supervisor of said town to be by him filed in the office of the town clerk as evidence of the recovery of said judgment a certified copy of said judgment under the hand of the clerk and the seal of said court, and did there and at said town demand of said Board and each member thereof that they should audit and allow the said balance of his judgment and costs with interest thereon from the rendition of judgment and take the necessary steps to allow and have the same certified to the town clerk of said town, on the first Tuesday in September, 1874, so that provision might be made for the payment thereof according to the township organization and revenue laws of said State, and that they should forthwith or at their semi-annual meeting on the said first Tuesday, comply with the provisions of section two of said act of March 25th, 1869, above set forth.

Your petitioner further represents that notwithstanding the said demand made upon them, the said persons constituting said Board of audi-

tors of said town of Ohio, have refused and neglected and still refuse and neglect to comply witn said demand and to audit and allow the whole of your petitioners said claim against said town, or take any steps whatever towards providing for the payment of the same in full; but on the contrary after the said demand had been made upon them, the said Board of auditors met on said first Tuesday in September 1875, and instead of auditing and allowing the whole of said balance, to which your petitioner was then entitled and which then remained unpaid and uncancelled, evaded their duty by auditing and allowing only the costs and parcel of said balance, amounting to the sum of $800 and with out any legal reasons neglected and avoided the auditing and allowance of the remainder, whereas in fact the said balance then due your petitioner amounted to the sum of $3,388.63; and your petitioner further shows that said balance still remains due and unpaid and belongs to your petitioner and that said Board of auditors have neglected and evaded and still neglect and evade to audit and allow your petitioners said claim or any portion thereof, saving said sum of $800.

And your petitioner further represents that it was the duty of said Board of auditors of said town, on the said first Tuesday in September, 1874, and it is still their duty to meet, allow and certify as aforesaid to the said claim of your petitioner and that by reason of the premises and the wrongful omission and refusals of said supervisor, town clerk and justice of the peace, your petitioner is now and has been unable to obtain the necessary levy and collection of taxes in said town for the purpose of satisfying the said balance due him on said judgment, that no provision whatever or levy of taxes has been made by said town to pay said judgment, nor has said town heretofore appropriated any funds for such purpose; and that your petitioner has no adequate remedy at law other than by proceeding of mandamus.

Wherefore your petitioner prays that the process of summons, according to the statute in such cases provided, issue out of this court commanding the said S. B. Lower, supervisor; Allen S. Walter, town clerk, and S. B. Lower, justice of the peace of said town, to appear at the present term of said court by some day to be fixed by the court and show cause why a premptory writ of mandamus should not issue against the supervisor, town clerk and justice of the peace of said town, constituting the Board of auditors of said town, commanding them to meet as such Board on the last Tuesday in March 1875, or at such time as shall be fixed by the

court and audit and allow the whole of said balance of judgment and costs with interest thereon, against said town, and certify the same in the manner provided by said act of March 4th, 1874, less said sum of $800, alledged by said auditors to have been audited by them, and to do and perform all such acts and things in the premises as the law requires; and that your petitioner may have such other and further relief in the premises as the nature of the case requires, and your petitioner will ever pray, &c. GEORGE O. MARCY.

By Paddock & Ide, his attorneys.

Northern District of Illinois.—ss.

George O. Ide being duly sworn says that he is the authorized agent of said petitioner to make this affidavit on his behalf; that the matters set forth in the foregoing petition as of his knowledge are true in substance and fact; and those stated upon information and belief he verily believes to be true. GEORGE O. IDE.

Subscribed and sworn to before me this fifth day of March, A. D. 1875. WM. H. BRADLEY, Clerk.

(Endorsed.) Filed March 5th, 1875. Wm. H. Bradley, Clerk.

Afterward to wit: on the 5th day of March, A. D. 1875, in the adjourned March Term of said court before the Hon. Henry D. Blodgett, district judge in the record of the proceedings thereof in said entitled cause in the following entry to wit:

The United States of America on the relation of George O. Marcy vs. S. B. Lower, supervisor, Allen S. Walter, town clerk and S. B. Lower, justice of the peace of the town of Ohio.	Mandamus.

Now comes the said relator George O. Marcy by his attorney and files his petition praying for a writ of summons herein, and thereupon it is ordered by the court that a writ of summons issue to the defendants, returnable on the fifteenth day of March instant. And on the same day to wit: the fifth day of March, A. D. 1875, a writ of summons issued out of said clerk's office against said defendants which said writ together with the return of the marshal annexed thereto is in the words and figures following to wit:

WRIT OF SUMMONS.

Circuit Court of the United States of America, } ss.
Northern District of Illinois. }

The United States of America,

To the Marshal of the Northern District of Illinois, Greeting:

We command you to summon S. B. Lower, supervisor; Allen S. Walters, town clerk, and S. B. Lower, justice of the peace of the town of Ohio, if found in your district, to be and appear before our judges of our circuit court of the United States for the Northern District of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the District aforesaid, on the fifteen day of March 1875, to answer the petition this day filed of George O. Marcy for a writ of mandamus and have you then and there this writ.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States of America, at Chicago aforesaid, this fifth day of March, in the year of our Lord one thousand eight hundred and seventy-five and of our Independence the 99th year.

[SEAL.]

WM. H. BRADLEY, Clerk.

SPECIAL DEPUTY'S RETURN.

United States of America, } ss.
Northern District of Illinois. }

Know all men by these presents that I have appointed and by these presents do appoint Thomas Foristall my true and lawful deputy to execute the annexed writ, George O. Marcy vs. S. B. Lower et al., and to make return of the execution thereof according to law.

B. H. CAMPBELL, [*Seal.*]
United States Marshal for the Northern District of Illinois.

I have served the annex writ in the following manner, to-wit: by reading the same to and in the presence and the hearing of S. B. Lower, supervisor, therein named, on the tenth day of March, A. D. 1875, of Allen S. Walters therein named on the tenth day of March A. D. 1875, of S. B. Lower, J. P., therein named on the tenth day of March A. D. 1875.

I did serve the other defendant therein named, being unable to find within my district.

B. H. CAMPBELL,
United States Marshal.

[SEAL.]

By THOS. FORRISTALL,
Special Deputy.

Thomas Forristall being duly sworn deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees actual incurred, and that the same is according to law. Sworn to before me this eleventh day of March A. D. 1875. JOSEPH HUNTER, Notary Public.

(Endorsed.) Filed March 15th, 1875. Wm. H. Bradley, Clerk.

Afterwards, to-wit: on the 17th day of March, A. D. 1875, in the said adjourned March Term of said court before the Hon. Henry W. Blodgett, district judge, in the record of the proceedings thereof in said entitled cause is the following entry, to-wit:

United States of America on the relation of Geo. O. Marcy vs S. B. Lower et al. } Mandamus.

On motion of the relator by his attorney, the respondents, S. B. Lower, supervisor, Allen S. Walters, town clerk, and S. P. Lower, justice of the peace of the town of Ohio, are hereby ruled to answer the petition herein by to-morrow morning.

Afterwards, to-wit, on the 18th day of March, A. D. 1875, in the said adjourned March Term of said court before the Hon. Henry W. Blodgett, district judge, in the record of the proceedings thereof in said entitled cause appears the following entry, to-wit:

United States of America on the relation of George A. Marcy vs. S. B. Lower, supervisor, Allen S. Walters, Town Clerk, and S. B. Lower, Justice of the Peace of the Town of Ohio. } Mandamus.

On motion of the relator by his attorney, it is ordered by the court that Perry F. Remsburg be and he is hereby made a co-defendant herein.

And on the same day, to-wit: the eighteenth day of March, A. D. 1875, said petitioner, by his attorney, filed in said clerk's office his amendment to his said petition, which said petition is in the words and figures following, to-wit:

AMENDMENT TO PETITION.

Northern District of Illinois, Circuit Court, March term, 1875.

George O. Marcey
vs
Samuel B. Lower et al. } Petition for Mandamus.

Now comes the petitioner, and by leave of court, amends his petition by inserting the name of Perry F. Remsburg as one of the justices of the peace of said town of Ohio, whereon said justices are named in said petition, and hereby makes said Remsburg a co-defendant in this cause and prays as set forth in said petition.

PADDOCK & IDE,
For Petitioner.

(Endorsed.)
Filed March 18, 1875.

WM. H. BRADLEY, Clerk.

And on the same day, to-wit: the 18th day of March, A. D. 1875, said petitioner, by his attorneys, filed in said clerk's office his precipe for a for a writ of summons against Perry F. Remsburg, co-defendant in said entitled cause which said precipe is in the words and figures, following, to-wit:

PRECIPE.

George O. Marcey
vs
S. B. Lower et al. } Petition for Mandamus.

Issue summons against Perry F. Remsburg, co-defendant impleaded with the others. To marshal of Northern District. Returnable on March 23, 1875.

PADDOCK & IDE.
For Petitioner.

(Endorsed.)
Filed March 18, 1875.

WM. H. BRADLEY, Clerk.

And on the same day, to-wit: the 18th day of March, A. D. 1875, a writ of summons issued out of said clerk's office against said co-defendant, Perry F. Remsburg, which said writ together with the return of the marshal annexed thereto, is in the words and figures following, to-wit:

Second.

WRIT OF SUMMONS.

Circuit Court of the United States of America. Northern District of Illinois. } ss.

Thomas Forristall being duly sworn deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees actual incurred, and that the same is according to law. Sworn to before me this eleventh day of March A. D. 1875. JOSEPH HUNTER, Notary Public.

(Endorsed.) Filed March 15th, 1875. Wm. H. Bradley, Clerk.

Afterwards, to-wit: on the 17th day of March, A. D. 1875, in the said adjourned March Term of said court before the Hon. Henry W. Blodgett, district judge, in the record of the proceedings thereof in said entitled cause is the following entry, to-wit:

United States of America on the relation of Geo. O. Marcy
vs
S. B. Lower et al. } Mandamus.

On motion of the relator by his attorney, the respondents, S. B. Lower, supervisor, Allen S. Walters, town clerk, and S. P. Lower, justice of the peace of the town of Ohio, are hereby ruled to answer the petition herein by to-morrow morning.

Afterwards, to-wit, on the 18th day of March, A. D. 1875, in the said adjourned March Term of said court before the Hon. Henry W. Blodgett, district judge, in the record of the proceedings thereof in said entitled cause appears the following entry, to-wit:

United States of America on the relation of George A. Marcy
vs.
S. B. Lower, supervisor, Allen S. Walters, Town Clerk, and S. B. Lower, Justice of the Peace of the Town of Ohio. } Mandamus.

On motion of the relator by his attorney, it is ordered by the court that Perry F. Remsburg be and he is hereby made a co-defendant herein.

And on the same day, to-wit: the eighteenth day of March, A. D. 1875, said petitioner, by his attorney, filed in said clerk's office his amendment to his said petition, which said petition is in the words and figures following, to-wit:

AMENDMENT TO PETITION.

Northern District of Illinois, Circuit Court, March term, 1875.

George O. Marcey
vs
Samuel B. Lower et al. } Petition for Mandamus.

Now comes the petitioner, and by leave of court, amends his petition by inserting the name of Perry F. Remsburg as one of the justices of the peace of said town of Ohio, whereon said justices are named in said petition, and hereby makes said Remsburg a co-defendant in this cause and prays as set forth in said petition.

PADDOCK & IDE,
For Petitioner.

(Endorsed.)
Filed March 18, 1875.

WM. H. BRADLEY, Clerk.

And on the same day, to-wit: the 18th day of March, A. D. 1875, said petitioner, by his attorneys, filed in said clerk's office his precipe for a for a writ of summons against Perry F. Remsburg, co-defendant in said entitled cause which said precipe is in the words and figures, following, to-wit:

PRECIPE.

George O. Marcey
vs
S. B. Lower et al. } Petition for Mandamus.

Issue summons against Perry F. Remsburg, co-defendant impleaded with the others. To marshal of Northern District. Returnable on March 23, 1875.

PADDOCK & IDE.
For Petitioner.

(Endorsed.)
Filed March 18, 1875.

WM. H. BRADLEY, Clerk.

And on the same day, to-wit: the 18th day of March, A. D. 1875, a writ of summons issued out of said clerk's office against said co-defendant, Perry F. Remsburg, which said writ together with the return of the marshal annexed thereto, is in the words and figures following, to-wit:

Second.

WRIT OF SUMMONS.

Circuit Court of the United States of America. Northern District of Illinois. } ss.

The United States of America.

To the Marshal of the Northern District of Illinois: Greeting:

We command you to summon Perry F. Remsburg, impleaded with S. B. Lower, Supervisor; Allen S. Walters, Town Clerk, and S. B Lower, Justice of the Peace of the town of Ohio, if found in your district, to be and appear before our judges of our circuit court of the United States for the North District of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid on the 23d day of March instant, to answer the petition of George O. Marcey for a writ of mandamus, and have you then and there this writ:

[SEAL.]

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme court of the United States of America, at Chicago aforesaid, this 18th day of March, in the year of our Lord one thousand eight hundred and seventy-five, and our independence the 99th year.

WM. H. BRADLEY,
Clerk

SPECIAL DEPUTIES RETURN.

United States of America, } ss.
Northern District of Illinois. }

Know all men by these presents: That I have appointed, and by these presents do appoint Thomas Forristall my true and lawful deputy to execute the annexed writ, Geo. O. Marcey vs. Perry F. Remsburg, impleaded, &c., and to make return of the execution thereof according to law.

B. H. CAMPBELL, [Seal.]
United States Marshal for the Northern District Illinois.

I have served the annexed writ in the following manner, to-wit: by reading the same to and in the presence and the hearing of Perry F. Remsburg, therein named, on the 19th day of March A. D. 1875.

B. H. CAMPBELL, United States Marshal.
By THOS. FORRISTALL, Deputy Deputy.

Thomas Forristall being duly sworn deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

Sworn to before me this twentieth day of March, A. D. 1875.
[Seal] L. B. CROOKER, Notary Public.

(Endorsed) Filed March 31, 1875. Wm. H. Bradley, Clerk.

Afterwards, to-wit: on the 22d day of March, A. D. 1875, said parties, by their attorneys, filed in said clerk's office their stipulation in said entitled cause which said stipulation is in the words and figures, following to-wit:

STIPULATION.

Northern District of Illinois,
Circuit Court, March Term, 1875.

U. S. ex. rel. George O. Marcey
vs
Supervisor, Town Clerk, and Justice of the Peace of the Town of Ohio, constituting the Board of Auditors of said Town. } Petition for Mandamus.

It is hereby agreed that the petititioner shall amend his petition so as include the name of Perry F. Remsburg, a justice of the peace of said town; that the defendants, Lower, Walter and Lower hereby enter their appearance in said cause, waiving service of process upon them; and that they will file their answer in said cause by the 22d day of March, 1875. G. GILBERT GIBONS, Atty. for Defts.

PADDOCK & IDE, For Petitioner.

(Endorsed.) Filed March 22d, 1875. Wm. H. Bradley, Clerk.

Afterwards, to-wit: on the 30th day of March, A. D. 1875, said defendants by their attorneys, filed in said clerk's office their answer in said entitled cause which said answer is in the words and figures following, to-wit:

ANSWER.

Northern District of Illinois.—ss.
United States Circuit Court of the March Term, A. D. 1875.

The United States of America on the relation of George O. Marcy
vs
S. B. Lower, supervisor, Allen S. Walter, town clerk, and S. B. Lower and Perry F. Remsburg, justices of the peace of the town of Ohio in the county of Bureau and State of Illinois. } Petition for Mandamus.

The joint and several answers of all the above named defendants to the petition of the above named petitioner, George O. Marcy.

For answer to the said petition these respondents say:

That it is true that on the twelfth day of March, A. D. 1873, said petitioner recovered a judgment on the common law side of this court, against the said town of Ohio for the sum of four thousand two hundred and eighty-six and 60-100 dollars, damages and costs of suit, which respondents admit now amount to two hundred and twenty-eight and 70-100 dollars.

Further answering, they admit that from the year A. D. 1851, to the present time the said town of Ohio has been a municipal corporation by virtue of the public laws of said state commonly called the township organization laws:

Further they admit that by section one of article thirteen of the act referred to in said petition, the supervisor, the town clerk and justices of the peace, of towns created under said act, are constituted a board of auditors, which shall consist of no less than three persons, each person to cast but one vote; and that it is made the duty of such board to meet at the times and places stated in said petition for the purpose of examining and auditing town accounts proper to be presented to such board, and to make a certificate to be signed by a majority of the said board, specifying the nature of the claim or demand, and to whom allowed, and cause such certificate to be delivered to the town clerk of such town, and on or before the second Tuesday in August of each year to certify to the county clerk the aggregate amount of such claims to be levied, and collected as other town taxes.

Further they admit, that the said town of Ohio is not classed amongst the towns mentioned in section four of article four of the said act.

Further answering, respondents admit that on the first day of September, A. D. 1874, and ever since, respondent, S. B. Lower, was, and has been supervisor and also a justice of the peace of said town, and respondent, Allen S. Walter was and has been the town clerk of said town.

Further, they aver that on the first Tuesday of April, A. D. 1874, being the day fixed by the laws of said state for the election of township officers, respondent, Perry F. Remsburg, then being a justice of the

peace in and for said town, and his term of office as such justice being then about to expire, was elected by the voters of said town as his own successor for the ensuing four years, but that he has hitherto neglected to take, subscribe and file with the county clerk of said county the oath of office, and to file the bond required by the laws of said state to be taken and filed by him as such justice, and that there has not been issued to him, by the Governor of said state nor delivered to him, by the said county clerk, as prescribed by the said laws a commission to act as such juctice of the peace under the said election; and that he has at no time since the day of such election, acted upon the said board of auditors.

Further answering, respondents admit that on said first day of September, said judgment remained unpaid except fifteen hundred dollars, and that on said day the petitioner presented to respondents Lower and Walters, a sworn statement showing a balance of three thousand three hundred and eighty-eight and 63-100 dollars still due upon said judgment and costs; and also delivered to respondent, Lower, a certified copy of said judgment, to be by him filed in the office of said town clerk; and also demanded of said respondents, Lower and Walter to audit and allow such balance and to take the necessary steps to allow and have the same certified to said town clerk on the first Tuesday of September, A. D. 1874, for the purpose of making provision for the payment thereof according to the township organization and revenue laws of said state, and that they should forthwith or at the semi-annual meeting on said first Tuesday comply with the provisions of section two of the act mentioned in said petition as in force on March twenty-fifth, A. D. 1869.

Further answering, respondents admit that on the first day of September, A. D. 1874, respondents, S. B. Lower, as supervisor, Allen S. Walters as town clerk, and also John Murtaugh as assessor of said town (the last named being called in under the provisions of the township organization law) constituting the board of auditors of said town, allowed eight hundred and seventy-one and 78-100 dollars (and not eight hundred dollars, as stated in said petition), upon said judgments and costs; then leaving a balance upon said judgment of two thousand five hundred and sixteen and 85-100 ($2,516.85) dollars (and not three thousand three hundred and eighty-eight and 63-100 dollars, as stated in said petition.)

Further answering, respondents admit that the cause of action on

which the said judgment was rendered consisted of coupons or interest warrants representing annual interest accrued on bonds issued by said town of Ohio under an act to amend an act entitled an "An act to incorporate the Illinois Grand Trunk Railway," in force March 25th, 1869.

Further answering, respondents aver that the said bonds, being each for the principal sum of one hundred dollars, and dated of the first day of January, A. D. 1871, were, to the number of four hundred, issued to the said railway company by the supervisor and town clerk of said town, on the sixth day of January, A. D. 1871, under and by virtue of said act of March 25th, A. D. 1869, after an election had been held in said town for the purpose of determining whether th · said town should subscribe to the stock of said railway, and that the said judgment was taken upon the coupons which had been attached to the said bonds, and representing the annual interest thereon that fell due on the first day of January, A. D. 1872.

And further, respondents say that the said bonds and coupons constituted a debt created by said town under the provisions of the said act of March 25th, A. D. 1869,to aid in the construction of the said railway, the line whereof runs into and through said town, and that the said railway into and through said town was completed at the date of registry of said bonds.

Further, that the supervisor of said town, he being the proper officer, upon the issuing of the said bonds made a registration thereof in a book kept for that purpose in his office, showing the date, amount, number, maturity and rate of interest of said bonds and upon the subscription to which railroad the same was given.

Further, that each of the said bonds was registered by the holder thereof at the office of the auditor of public accounts of said state, who caused the same to be registered in a book kept for that purpose on the fifteenth day of April, A. D. 1871; such registration showing the date, amount, number, maturity and rate of interest of such bonds, under what act and by what town issued, and that the said auditor, under his seal of office, certified upon such bonds the fact of such registration.

Further, that each of said bonds and coupons was, upon its face, made payable at the office of the state treasurer, in Springfield, in said state.

Further answering, respondents deny that it is the duty of the author-

ities of said town to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing upon the said bonds.

But respondents aver that the said bonds were made payable at the state treasury of said state, and were registered as aforesaid under and by virtue of the act of said state, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16th, A. D. 1869; that the said debt was created with reference to the provisions of the said act, and that the means for the collections and means of payment, of the said bonds and coupons, or judgments rendered thereon, are fully and solely prescribed by the provisions of the said act, which was in force at the time of creating the said indebtedness and the issuing of the said bonds and coupons, and has been ever since.

That it is the duty of the county clerk of said county, each year, to furnish the state auditor of said state a certificate stating the total value of all property, real and personal, within said town, as exhibited by the assessment rolls for state taxation, and of the said state auditor annually to ascertain the amount of interest for the current year due and accrued and to accrue upon such bonds, and, from the amount so ascertained, to deduct the amount in the state treasury placed to the credit of said town, as in said act directed, and to estimate and determine the rate per centum on the valuation of property within said town requisite to meet and satisfy the amount of interest unprovided for, together with the ordinary cost to the state of collection and disbursement of the same, to be estimated by the said auditor and treasurer, and to make and transmit to the said county clerk a certificate stating such estimated requisite per centum for such purpose, to be filed in his office; and that the said act further fully provides for the collection of the taxes by which said interest shall be met and satisfied, the payment of such taxes to the said state treasurer, and the payment of said interest to the holders of the said coupons, upon presentation to said treasurer.

Further answering, respondents say that, believing that the petitioner was entitled to only the face of his said coupons, to-wit: four thousand dollars at the hands of the state treasurer, the audited and allowed said said sum of eight hundred and seventy-one and 78-100 dollars being for the interest as estimated by them upon said judgment, the two hundred

and eighty-six and 60-100 dollars of interest, included in said judgment upon said coupons, and the costs of said suit.

And respondents further say that the fifteen hundred dollars paid to the petitioner upon the said judgment were received by him from the hands of the said state treasurer and under the provisions of said act, in force April 16th, A. D. 1869.

And respondents aver that the merging of the said coupons into the said judgment does not change their character nor the mode of collecting the same, and insist that said judgment does not come within the the provisions of the sixth section of article five of said township organization law nor within any other provisions of said law.

And further respondents say that they are not amenable to the process of this as prayed for by the petitioner, and pray to be hence dismissed with their reasonable costs in this behalf expended.

J. J. Herron and
G. Gilb't Gibons,
Counsel for Respondents.

S. B. Lower,
A. S. Walters,
P. F. Remsberg.

(Endorsed.) Filed March 30, 1875. Wm. H. Bradley, Clerk.

And on the same day to wit: the 30th day of March, A. D. 1875, said plaintiff, by its attorney, filed in said clerk's office its demurrer to said answer, which said demurrer is in the words and figures following to wit:

DEMURRER TO ANSWER.

Northern District of Illinois.—ss.
United States Circuit Court,
March Term, 1875,

United States ex. rel:
George O. Marcy
vs
Samuel B. Lower and others.
} Petition for Mandamus.

And said petitioner, George O. Marcy, comes and defends the wrong and injury when, &c., and says that the parts of said defendants answer, and each of them to-wit:

1. The allegations in the answer concerning the levy of taxes under the act of the Legislature of Illinois, approved March 16, 1869, and that in consequence of the provisions of said act, the defendants are excused from the performance of the duty alleged in the petition.

2. The allegation in the answer that Perry F. Remsburg is not one of the Board of Auditors of the town of Ohio, for the reasons alleged in the answer.

3. All other parts of said answer which deny the petitioner's right to the remedy sought are insufficient in law for him to answer unto, and this he is ready to verify. Wherefore petitioner prays judgment, &c.

By PADDOCK & IDE, his attorneys.

(Endorsed.)
Filed March 30, 1875. Wm. H. Bradley, Clerk.

Afterwards, to-wit: on the 31st day of March, A. D. 1875, in the adjourned March Term of said court before the Hon. Thomas Drummond, judge in the record of the proceedings thereof in said entitled cause is the following entry, to-wit:

United States of America on the relation of Geo. O. Marcy
vs
S. B. Lower et al. } Mandamus.

Now come the parties by their attorneys and thereupon the demurrer of the relator to the answer of the defendants herein is submitted to court on briefs.

And afterwards to wit: on the 8th day of April, A. D. 1875, in the said adjourned March Term of said court before the Hon. Henry W. Blodgett, district judge, in the record of the proceedings thereof in said entitled cause appears the following entry, to-wit:

United States of America on the relation of George O. Marcy
vs.
Samuel B. Lower, the supervisor, Allen S. Walters, the Town Clerk, and Samuel B. Lower and Perry F. Remsburg, the Justices of Peace of the Town of Ohio, in the county of Bureau and State of Illinois. } Petition for Mandamus.

This day came the said relator by his attorneys, Paddock and Ide, and also all of said above-named defendants by their attorney, G. G. Gibons, and the court being now fully advised in the premises, doth consider that the demurrer of said relator to the answer of said defendants be sustained. And the court having found from the petition and answer herein and the allegations therein confessed that there remained unaudited by

and eighty-six and 60-100 dollars of interest, included in said judgment upon said coupons, and the costs of said suit.

And respondents further say that the fifteen hundred dollars paid to the petitioner upon the said judgment were received by him from the hands of the said state treasurer and under the provisions of said act, in force April 16th, A. D. 1869.

And respondents aver that the merging of the said coupons into the said judgment does not change their character nor the mode of collecting the same, and insist that said judgment does not come within the the provisions of the sixth section of article five of said township organization law nor within any other provisions of said law.

And further respondents say that they are not amenable to the process of this as prayed for by the petitioner, and pray to be hence dismissed with their reasonable costs in this behalf expended.

J. J. Herron and
G. Gilb't Gibons,
Counsel for Respondents.

S. B. Lower,
A. S. Walters,
P. F. Remsberg.

(Endorsed.) Filed March 30, 1875. Wm. H. Bradley, Clerk.

And on the same day to wit: the 30th day of March, A. D. 1875, said plaintiff, by its attorney, filed in said clerk's office its demurrer to said answer, which said demurrer is in the words and figures following to wit:

DEMURRER TO ANSWER.

Northern District of Illinois.—ss.
United States Circuit Court,
March Term, 1875,

United States ex. rel:
George O. Marcy
vs
Samuel B. Lower and others.
} Petition for Mandamus.

And said petitioner, George O. Marcy, comes and defends the wrong and injury when, &c., and says that the parts of said defendants answer, and each of them to-wit:

1. The allegations in the answer concerning the levy of taxes under the act of the Legislature of Illinois, approved March 16, 1869, and that in consequence of the provisions of said act, the defendants are excused from the performance of the duty alleged in the petition.

2. The allegation in the answer that Perry F. Remsburg is not one of the Board of Auditors of the town of Ohio, for the reasons alleged in the answer.

3. All other parts of said answer which deny the petitioner's right to the remedy sought are insufficient in law for him to answer unto, and this he is ready to verify. Wherefore petitioner prays judgment, &c.

By PADDOCK & IDE, his attorneys.

(Endorsed.)

Filed March 30, 1875. Wm. H. Bradley, Clerk.

Afterwards, to-wit: on the 31st day of March, A. D. 1875, in the adjourned March Term of said court before the Hon. Thomas Drummond, judge in the record of the proceedings thereof in said entitled cause is the following entry, to-wit:

United States of America on the relation of Geo. O. Marcy
vs
S. B. Lower et al. } Mandamus.

Now come the parties by their attorneys and thereupon the demurrer of the relator to the answer of the defendants herein is submitted to court on briefs.

And afterwards to wit: on the 8th day of April, A. D. 1875, in the said adjourned March Term of said court before the Hon. Henry W. Blodgett, district judge, in the record of the proceedings thereof in said entitled cause appears the following entry, to-wit:

United States of America on the relation of George O. Marcy
vs.
Samuel B. Lower, the supervisor, Allen S. Walters, the Town Clerk, and Samuel B. Lower and Perry F. Remsburg, the Justices of Peace of the Town of Ohio, in the county of Bureau and State of Illinois. } Petition for Mandamus.

This day came the said relator by his attorneys, Paddock and Ide, and also all of said above-named defendants by their attorney, G. G. Gibons, and the court being now fully advised in the premises, doth consider that the demurrer of said relator to the answer of said defendants be sustained. And the court having found from the petition and answer herein and the allegations therein confessed that there remained unaudited by

the Board of Auditors of said town of Ohio, on the first day of September, eighteen hundred and seventy-four, a balance upon said relator's judgment of twenty-five hundred and sixteen dollars and eighty-five cents, and that said relator is entitled to the relief prayed for in his petition to the extent of said sum with interest thereon from said first day of September eighteen hundred and seventy-four. It is considered and adjudged by the court that judgment be accordingly entered against said defendants and that said relator do have and recover of said defendants his costs of suit in this behalf expended and that he have execution therefor.

And it is further considered and adjudged by the court that a peremptory writ of mandamus issue out of this court directed to the supervisor, town clerk and justices of the peace of the town of Ohio, in the county of Bureau and State of Illinois, commanding them and each of them that they do meet forthwith in said town, as the Board of Auditors of said town, and that as such Board they do at such meeting audit and allow as a charge against said town the said sum of twenty-five hundred and sixteen dollars and eighty-five cents, being the unaudited balance of judgment rendered in our said court in favor of said relator against said town of Ohio, on the twelfth day of March eighteen hundred and seventy-three, together with interest on said unaudited balance at the rate of six per cent per annum from the first day of September eig..teen hundred and seventy-four, and that they do then and there make, sign and certify to and deliver to and file with the town clerk of said town a certificate showing an allowance of said unaudited balance of twenty-five hundred and sixteen dollars and eighty-five cents and interest thereon as aforesaid to said relator, George O. Marcy, and also that they do and perform forthwith all such other acts and things in the premises as the law requires of them, and each of them to do for the allowance and proper certification of said claim, so that provision may be made for the collection thereof by the levy of taxes in said town, and that all and singular the matters for the complete performance without delay or hindrance of the foregoing, they and each of them as such Board of Auditors and members thereof shall do and execute forthwith, and how they shall have executed said peremptory writ, that they make it appear to our said court by due return thereof unto our said court at Chicago in said Northern District, on or before the fifteenth day of June next.

And afterwards on the 9th day of June, A. D. 1875, a peremptory writ of mandamus in said entitled cause, issued out of said clerk's office against said defendants, a copy of which said writ as returned by the marshal, together with his endorsements thereon is in the words and figures following, to wit:

WRIT OF MANDAMUS.

United States of America,
Northern District of Illinois.
In the Circuit Court, March Term, A. D. 1875.

The United States of America, to the supervisor, town clerk and justices of the peace in and for the town of Ohio, in the county of Bureau and State of Illinois, and each of you.—Greeting:

Whereas, George O. Marcy, a citizen of the State of Massachusetts, on the twelfth day of March, A. D. 1873, at the March Term, A. D. 1873, of the Circuit Court of the United States, for the Northern District of Illinois, recovered in said court a certain judgment against the town of Ohio, in the county of Bureau and State of Illinois, in a suit at law, wherein said George O. Marcy was plaintiff and the said town was defendant, for the sum of $4,286.60 as damages, and $228.70 as costs of suit, as appears by the record of said judgment now remaining in said court; and whereas the said town of Ohio is now, was at the time of the rendition of said judgment, and ever since, to-wit, the year A. D. 1851, has been a municipal corporation, created and acting under and by virtue of the public statutes of said State, commonly called the Township Organization Laws; and whereas, by the first section of article 13 of an act of the General Assembly of said State, entitled "An act to revise the law in relation to Township Organization," in force March 4th, 1874, and by which act, since the passage thereof, the said town of Ohio has been controlled, it is provided that in said town the supervisor, town clerk and justices of the peace of the town shall constitute a Board of Auditors which shall consist of no less than three persons; and by said article it is further provided that it shall be the duty of said Board of Auditors to meet at the town clerk's office for the purpose of examining and auditing the town accounts, semi-annually, on the Tuesday next preceding the annual meeting of the County Board, and on the Tuesday next preceding the annual town meeting, which meeting of the County Board or Board of Supervisors of said Bureau county is fixed by law to be holden on the second Tuesday in

September in each year, and the said annual town meeting on the first Tuesday in April in each year; and whereas, by said article it is made the duty also of said Board of Auditors to examine and audit all claims and charges against their town, among which charges, by force of section 6 of article 5 of said act, judgments against the said town of Ohio are embraced, and also to make a certificate to be signed by a majority of the said Board, specifying the nature of the claims or demand and to whom the amount is allowed, and to cause such certificate to be delivered to the town clerk of said town; the aggregate amount of said claims allowed by said Board being required by said act to be certified to the county clerk of said county at the same time and in the same manner as other amounts required to be raised for town purposes to be levied and collected as other town taxes; and whereas, in and by said act it is further provided, that the moneys necessary to defray the said town charges against said town of Ohio shall be levied on the taxable property in said town in the manner prescribed in the act for raising revenue and other moneys for State and county purposes and expenses.

And whereas, on the 1st day of September, A. D. 1874, the Board of Auditors of said town of Ohio consisted of Samuel B. Lower, the supervisor of said town; Allen S. Walters, the town clerk; Samuel B. Lower and Perry F. Remsburg, the justices of the peace of said town; and on the day and year last aforesaid, the said judgment and costs so adjudged against said town, remaining due and wholly unpaid, less the sum of $1,500 then paid on said judgment and costs and belonging to said George O. Marcy, the said plaintiff, presented to said Board of Auditors and each member thereof, a sworn statement of the balance due on his said judgment and costs against said town accompanied by an affidavit that said claim was correct, just and unpaid; and also then delivered to said town clerk, to be by him filed in his office, a certified copy of said judgments under the seal of said court; and then and at said town demanded of said board and each member aforesaid thereof, that they should audit and allow to him said balance due on said judgment, costs and interest thereon from the date of said judgment, and take the necessary steps to allow and have the same certified to the town clerk of said town on the first Tuesday in September, A. D. 1874, so that provision might be made for the payment thereof according to law, and that they should meet on said first Tuesday for said purpose, and that they should comply with the provisions of section 2 of an act of the General

Assembly of said state entitled " an act to amend an act entitled an act to incorporate the Illinois Grand Trunk Railway," in force March 25th, 1869.

And whereas, notwithstanding the said demand made upon them, the said officers constituting the said board of auditors of said town of Ohio, have refused and neglected and still refuse and neglect to comply with said demand, and to audit and allow the whole of said claim of the said George O. Marcy, plaintiff aforesaid, or to take any steps whatever towards providing for the payment of the same in full, but on the contrary, after the said demand had been made upon them, met as such board on said first Tuesday of September, 1874, and evaded their duty by auditing and allowing only the costs and parcel of said balance, to the amount of $871.78, and without any legal reason neglected and avoided the auditing and allowance of the remainder, there being then due on said judgment, costs and interest to said petitioner the sum of $3,388.63, which amount still remains due and unpaid to said petitioner.

And whereas, in a certain proceeding by mandamus lately pending in our said court against said officers, on the relation of George O. Marcy, it has appeared to our said court that the said acts, omissions and refusals of said persons constituting said board of auditors of said town of Ohio, have been done by them without just cause or excuse, and operate to delay and hinder and defeat the collection of said judgment.

And whereas, it was on the first Monday in September, 1874, and yet is the duty of said board of auditors and of said supervisor, town clerk, and the justices of the peace of said town, to meet, allow, and to certify as aforesaid to the town clerk of said, the said claims of the said plaintiff, so that provision may be made for the payment thereof by the levy and collection of taxes; and whereas by reason of the premises and the wrongful acts and refusals of said officers, done as aforesaid, no provision or appropriation whatever, or levy of taxes has been made by said town to pay said unaudited balance of said judgment and costs, or any part thereof, and said plaintiff has no other sufficient remedy at law, as our said court has been informed by the complaint of said relator and the answer thereto made by said defendants in the said proceeding by mandamus according to the law in such cases provided; and whereas, in the proceeding it was, by our said court, at said March term, 1875, thereof, on the 8th day of April, 1875, considered and ordered, that a peremptory writ of mandamus issue therein.

Therefore, being willing that due and speedy justice should be done in this behalf to the said George O. Marcy, we do command you, the supervisor, the town clerk and justices of the peace of the said town of Ohio, and each of you that you do meet as the board of auditors of said town of Ohio, in said town forthwith; and that as such board, you do then and there, at such meeting, audit and allow as charges against said town due to said George O. Marcy, the sum of $2,516.85 being the unaudited balance of said judgment rendered in our said court in favor of said Marcy against said town, together with interest on said unaudited balance at six per cent. per annum from the first day of September, 1874; and that you do then and there make, sign and certify to, and deliver to and file with the town clerk of said town a certificate, showing allowance of said $2,516.85, the unaudited balance of said judgment, and interest thereon as aforesaid, to the said relator, George O. Marcy; and that you do and perform all such other acts and things in the premises as the law requires of you and each of you to do for the allowance and proper certification of said claims so that provision may be made for the collection thereof by the levy of taxes in said town; and that all and singular the matters for the complete performance, without delay or hindrance of the foregoing, according to the exigency of the law, you and each of you as such board of auditors and members thereof, shall do and execute forthwith; and how you shall have executed this, our peremptory writ of mandamus, make it appear to our said court, by due return thereof into our said court, at Chicago in said Northern District, on or before the 15th day of June, 1875; and this you are not to omit on peril that may fall thereon.

To the Marshal of the Northern District of Illinois, to execute.

[SEAL]

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme court of the United States of America, at Chicago aforesaid, this 9th day of June, in the year of our Lord one thousand eight hundred and seventy-five, and our independence the 99th year.

WM. H. BRADLEY,
Clerk

A true copy of the original writ, I hereby depute Thomas Forristall to serve the original writ of mandamus of which the within is a true

copy. B. H. CAMPBELL, United States Marshal.

June 10th, A. D. 1875.

I have served the original writ of mandamus of which the within is a true and correct copy in the following manner, to-wit: upon Archable Scott, justice of the peare in for the town of Ohio, county of Bureau, State of Illinois, by showing him the original writ of which the within is a true and correct copy, and by delivering to him a true copy of the same upon the 11th day of June A. D. 1875, upon Samuel B. Lower, justice of the peace in and for the town of Ohio, Bureau county, State of Illinois, by delivering to him a true copy and by showing to him the original writ of mandamus above named on the 11th day of June, A. D. 1875, upon George Ellis, town clerk of the town of Ohio, county of Bureau and State of Illinois, by showing to him the original writ of mandamus of which the within is a true copy, and by delivering to him a true copy of the same on the 11th day of June, A. D. 1875, upon Daniel Smith, supervisor in and for the town of Ohio, in the county of Bureau, State of Illinois, by delivering to him the original writ of mandamus of which the within is a true and correct copy, upon the 11th day of June, A. D. 1875. B. H. CAMPBELL, U. S. Marshal.

By THOS. FORRISTALL, Special Deputy.

The above return subscribed and sworn to before me this 11th day of June, A. D. 1875, by Thomas Forristall.

[Seal] L. B. CROOKER, Notary Public.

(Endorsed) Filed June 26th, A. D. 1875. Wm. H. Bradley, Clerk.

And afterwards, to-wit: on the 27th day of July, A. D. 1875, said defendants, filed in said clerk's office their bond and appeal in said entitled cause which said bond is in the words and figures following, to-wit:

Know all men by these presents that we, Samuel B. Lower, Allen S. Walters, Perry F. Remsburg, as principals, and George Hammer, Jacob Ross, Joel D. Ross, James Ross, Jacob K. Ross, George Z. Willey, Wm. Townsend, Payton Bishop, Jeremiah Lamb, Albert Lamb, Wm. James, Robert L. Garten, John W. Bailey, Henry F. Corey, John H. Corey, John T. Clark, James Spake, Daniel Jones, Wm. Turnbull, Daniel Kiser and John Burres, as surities of the county of Bureau in the state of Illinois, are held and firmly bound unto George O. Marcy in the penal sum of five thousand dollars for the payment whereof, well and truly to be made we

bind ourselves our heirs, executors and administrators, jointly and firmly by these presents.

Witness our hand and seal this 27th day of July, A. D. 1875.

The condition of the above obligation is such that whereas in a proceeding of mandamus, in the Circuit Court of the United States for the Northern District of the state of Illinois, wherein the said George O. Marcy was petitioner and the said Samuel B. Lower, as supervisor, Allen S. Walters, as town clerk, and Samuel B. Lower and Perry F. Remsburg, as justices of the peace of the town of Ohio, in the county of Bureau and state of Illinois, were defendants, the said court rendered its judgment, on the eighth day of April, A. D. 1875, at the March term, A. D. 1875, of said court whereby it was ordered that said defendants, as the board of auditors of said town audit and allow as a charge against said town $2,516.85, being the unaudited balance of a judgment in favor of said Marcy against said town, rendered in said court on March 12th, 1873, with six per cent. interest thereon from September 1st, 1874, and make, sign, and certify to, and deliver to and file with the town clerk of said town a certificate showing an allowance thereof and ordered its peremptory writ of mandamus against said defendants returnable June 15, 1875, from which judgment of the said court the said defendants have prayed a writ of error, to operate as a supersedeas.

Now if the said defendants, the plaintiffs in error, shall prosecute their said writ to effect and if they fail to make their plea good, shall answer all damages and costs, then this obligation to be void, otherwise to remain in full force and effect.

P. F. Remsburg,	[*Seal.*]
S. B. Lower,	[*Seal.*]
A. S. Walter,	[*Seal.*]
George Hammer,	[*Seal.*]
Jacob Ross,	[*Seal.*]
Joel D. Ross,	[*Seal.*]
James Ross,	[*Seal.*]
J. K. Ross,	[*Seal.*]
G. Z. Welley,	[*Seal.*]
Wm. Townsend,	[*Seal.*]
Payton Bishop,	[*Seal.*]
J. Lamb,	[*Seal.*]

Albert Lamb,	[*Seal.*]
William James,	[*Seal.*]
R. L. Garton,	[*Seal.*]
J. W. Bailey,	[*Seal.*]
H. F. Corey,	[*Seal.*]
J. H. Corey,	[*Seal.*]
J. T. Clark,	[*Seal.*]
James Spake,	[*Seal.*]
Daniel Jones,	[*Seal.*]
Wm. Turnbull,	[*Seal.*]
Daniel Kiser,	]*Seal.*]
John Burres,	[*Seal.*]

Approved, H. W. BLODGETT, Judge.

(Endorsed.)

Filed July 27th, 1875. WM. H. BRADLEY, Clerk.

Northern District of Illinois.—ss.

I, William H. Bradley, clerk of the circuit court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said court in said entitled cause wherein The United States of America on the relation of George O. Marcy is the plaintiff and Samuel B. Lower, the supervisor, et al., are the defendants, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this eighteenth day of September, A. D. 1875.

[Seal.]

WM. H. BRADLEY, Clerk.

WRIT OF ERROR.

The United States of America.

To the Judges of the United States for the Northern District of Illinois. Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in said court before you, the United States of America in the relation of George O. Marcy plaintiff, and Samuel B. Lower, the supervisor, Allen S. Walters, the Town Clerk, and Samuel B. Lower and Perry F. Remsburg, the Justices of Peace of the Town of Ohio, in the county of Bureau and State of Illinois, defendants, a mani-

fest error hath happened to the great damage of the said Samuel B. Lower, the supervisor; Allen S. Walters, the town clerk, and Samuel B. Lower and Perry F. Remsburg, justices of the peace of the town of Ohio, in the county of Bureau and state of Illinois, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

[SEAL.]

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States, this tenth day of April, A. D. 1875.

WM. H. BRADLEY,

Clerk of the circuit court of the United States, Northern District of Illinois.

CITATION.

United States of America—

To George O. Marcy.—Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, on the eleventh day of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the Northern District of Illinois, wherein Samuel B. Lower, the supervisor, Allen S. Walters, the clerk, and Samuel B. Lower and Perry F. Remsburg, the justices of the peace, of the town of Ohio, in the county of Bureau and state of Illinois, are plaintiffs, and the United States of America on the relation of George O. Marcy, are defendants, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the plaintiffs in that behalf.

[*Seal.*]

Witness the Hon. Morrison O. Waite, chief justice of the said Supreme Court of the United States, this 27th day of July, one thousand eight hundred and seventy-five.

H. W. BLODGETT, Judge.

Received July 27th, 1875, a copy of the foregoing citation.

GEO. O. IDE,

For George O. Marcy, defendant in error.

Supreme Court of the United States.

October Term, A. D. 1875.

SAMUEL B. LOWER, *et al.*
Plaintiffs in Error.

vs.

UNITED STATES, *ex. rel.*
GEORGE O. MARCY,
Defendant in Error.

Error to Circuit Court of the U. S. for N. D. of Illinois.

Brief for Plaintiffs in Error,

BY

J. J. HERRON.

J. J. HERRON AND T. LYLE DICKEY,
Attorneys for Plaintiffs in Error.

Filed .....

.....*Clerk.*

PRINCETON.
BUREAU COUNTY TRIBUNE PRINT.
1876.

Supreme Court of the United States.

October Term, A. D. 1875.

Samuel B. Lower, the Supervisor; Allen S. Walters, the Town Clerk; and Samuel B. Lower, and Perry F. Remsburg, the Justices of the Peace, of the Town of Ohio, in the County of Bureau and State of Illinois, Plaintiffs in Error,

vs.

United States of America on the relation of George O. Marcy, Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

May it Please Your Honors:

This was a proceeding in the Circuit Court for the Northern District of Illinois, by petition for a writ of *mandamus* against plaintiffs in error, to compel them, as town auditors for the town of Ohio, in the County of Bureau, State of Illinois, to audit the amount of a judgment rendered in said Court at the March term thereof, A. D. 1873.

The petition sets fourth that the petitioner obtained a judgment for the sum of forty-two hundred and eighty-six dollars and sixty cents, with costs of suit, amounting to the sum of two hundred and twenty-eight dollars and seventy cents; that said town of Ohio is, and was at the time of the rendition of said judgment, a municipal corporation, by virtue of the township organization laws of the State of Illinois. That the said judgment was rendered on certain coupons, or interest warrants,

representing the interest accrued on loans issued by said town, to the Illinois Grand Trunk Railway, by virtue of an act of the General Assembly of said State, in force March 25th, 1869. That plaintiffs in error were the auditors of said town. That a sworn statement of the amount of said judgment was laid before said auditors; and delivered to the Supervisor of said town, a certified copy of said judgment.

The petition further sets forth that said auditors refused and neglected to comply with the demands of the petitioner to audit the amount of said judgment.

The petition also sets forth that it was the duty of said Board of Auditors, to meet on the first Tuesday in September, 1874, and was their duty thereafter, to meet, allow and certify to the town clerk of said town the amount of said judgment.

It is admitted by the answer of defendants below, that judgment was rendered as set forth in the petition for the writ, but not in the amount claimed therein. That the town of Ohio was a municipal corporation. That plaintiffs in error were the auditors of said town. That said town is classed amongst the towns mentioned in the Township Organization laws of said State. That Lower was Supervisor and Walter, Town Clerk, as set forth in the petition, and that said auditors allowed a portion of said judgment, viz: the sum of eight hundred and seventy-one and 78-100 dollars, leaving a balance upon said judgment of two thousand, five hundred and sixteen and 85-100 dollars, ($2,516.85.)

It is further admitted that said judgment was rendered on coupons, or interest warrants, issued by said town of Ohio, under an act to amend an act, entitled "An act to incorporate the Illinois Grand Trunk Railway," in force March 25th, 1869.

The relator filed a demurrer to the answer of respondants, which demurrer was sustained by the Court, and a peremptory writ of *mandamus*, issued and served on defendants below, commanding them to audit the sum of $2,516.85.

The demurrer admits the truth of the facts set out in the answer to which it is interposed, not only those which rest in parole, but also those which upon a trial could have been established by record evidence.

Therefore for the purpose of this investigation, all of the facts as set forth in the answer of plaintiffs in error, must be taken as true.

The People *v.* Vermillion Co., 47 Ill. 256.

We desire to call the attention of your Honors to a few principles long established and well recognized as good law, not only in the State Courts of last resort, but by the Supreme Court of the United States.

1st. The rights of a party claiming the interference of a Court, by *mandamus*, must be clear and certain, absolute and positive, perfect and complete; and he must have no other remedy by which he can obtain it.

2d. The party applying for a writ of *mandamus*, ought not only show a clear legal right to the remedy sought, but it must be in the power of respondents and *their duty* also, to do the act prayed for, and in the manner as set forth in the petition.

County Court of Macoupin County *vs.* The People ex rel 58 Ill. 191.
The People ex rel Bonker et al 66 Ill. 339.

The Illinois Grand Trunk Railway was incorporated by an act of the General Assembly of the State of Illinois, of 1867. This act merely gave the incorporators the authority to construct the road, as therein provided. By an amendment thereto, in force March 25th, 1869, townships, cities and towns, etc., are empowered to vote aid to the construction of said railway. The only provision as to the payment of the bonds issued by either of said acts is as follows: "It shall be the duty of the proper authorities of any city, town or township issuing bonds as aforesaid, to make all necessary arrangements, and provide for the prompt payment of all interest and other liabilities accruing thereon and to levy such taxes as may be necessary therefor, as other taxes are levied by them."

Private Laws 1869, Vol. 3d. 307.

This clause of the amended Charter of the Illinois Grand Trunk Railway, requires the town authorities to levy such taxes as may be necessary, as other taxes are levied.

By Township Organization laws, Revised Statutes of Illinois, 1874, page 1081, Sec. 4, the auditors are required to examine and audit all charges and claims against their town. By Sec. 5, same page, the accounts so audited and those rejected, shall be delivered to the town clerk.

Sec. 9, page 1082, provides: That the money necessary to defray the town charges shall be levied in the manner prescribed in this act for raising revenue for State and county purposes.

It is one of the most firmly established rules of law, that corporations can exercise no power but such as is delegated to them. When the township organization law specifies certain purposes therein specified, the law itself must be followed as to manner of taxation and amount to be raised.

Drake et al *vs.* Phillips, 40 Ill. 388.

This application is made for a writ of *mandamus* to compel the gauditing of the judgment set forth in the petition herein, on the presumption that the same is a town charge, in contemplation of Sec. 8, Revised Statutes of Illinois, 1874, page 1082. Without discussing the question as to whether or not, it was such a charge, one of the controlling questions presented is

1st. Whether a judgment, rendered by a court of record, should be laid before the auditing board. Their duty, by Sec. 3 and 4, Revised Statutes 1081, are to examine and audit accounts of the supervisor, overseer of the poor, commissioner of the highways, and all charges and claims and compensation of town officers.

A judgment, while it is a claim against the town, it is not such a claim as requires the board to pass upon it. It requires no examination. A Court of competent jurisdiction has passed upon the validity of the claim. It requires no further examination. The Circuit Court, in rendering the judgment, audits the claim, and it only requires that the amount thereof should be extended on the collector's list.

Sec. 8, defines what are to be considered town charges. It must be apparent that neither of the four kinds of town charges therein enumerated, refers to a judgment that can neither be increased or diminished. Under the head of "The Board of Town Auditors," such town charges as can come before them are specifically set forth.

By Chapter 5, Revised Statutes, page 1073, provision is made for legal proceedings against and in favor of towns. By Sec. 6, judgments against a town are declared a town charge; but not such a charge as can properly come before the auditors. By Sec. 4, page 1081, the town clerk, is required to certify to the county clerk the amount of taxes required to be raised for all town purposes.

By Sec. 122, Revised Statutes, page 878, the proper authorities of towns, townships, etc., shall annually, on or before the second Tuesday

in August, certify to the county clerk the several amounts which they severally require to be raised by taxation.

Who are the proper authorities of a township? Not town auditors but the supervisor and town clerk. The former can and it is his duty to receive the amount of judgment properly certified, and through the town clerk, have the same certified to the county clerk.

Sec. 4, page 1081.

By Sec. 8, page 1080, the supervisor is required to lay before the auditors, all accounts which may be presented to him against the town. The term account has a technical signification, and is undoubtedly used in the sense of reckoning or computing, requiring investigation; a claim that requires to be passed upon before allowed.

A judgment of the Circuit Court of the United States, requires no reckoning, no computation, and if open to investigation—as hereafter shown—can be rejected.

Hutchinson *v.* Commissioners of Canal Fund, 25 Wend, 692.

II.

The act of March 25, 1869, authorizing towns, &c., to vote aid to the Illinois Grand Trunk Railway, provides only "that taxes shall be levied and paid to liquidate the indebtedness thus created," leaving the manner of raising the revenue to other provisions of the statutes.

By the act in force April 16, 1869, Revised Statutes, 1874, page 791, the interest and bonds issued by said town, were payable and registered by virtue of said act, in the auditor's office at the City of Springfield, and said bonds and coupons were upon their face, payable at the auditor's office at the City of Springfield, in said State. This fact is fully set forth in the answer of plaintiffs in error and of course admitted by the demurrer. The only law in force when a demand was made on the auditors of said town of Ohio, was the act of April 16, 1869. This act expressly provided that all indebtedness of the character set forth in the petition in this case, should be paid, when registered, at the city of Springfield, and the holder of coupons, or bonds, are required to present them there for payment.

While all judgments against townships are to be considered a town charge, the General Assembly provides that in the case of principal and interest of railroad bonds, they shall be paid, not through the auditor of

the town, but by the provisions of the Funding bill, so called.

It might be that the auditors of said town had the authority to audit the amount of the judgment in question, but the exercise of such authority was discretionary, and when an act is discretionary with an officer, a writ of *mandamus* will not be granted to compel him to act.

The General Assembly, in 1869, when it enacted the Funding act, evidently intended that it should be the law of the State, and through which the towns, cities, &c., having a railroad bonded indebtedness, were to pay the principal and interest thereto. While the private law in force March 25, 1869, authorizing towns, &c., to vote aid to the Illinois Grand Trunk Railway, provided that it should be the duty of towns, etc., voting such aid, to "make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing therein, and to levy such taxes as may be necessary therefor, *as other taxes are levied.*"

We italicise "as other taxes are levied," for the purpose of drawing the attention of the Court to the mode by which the interest was to be paid. That is, by the then existing revenue laws of Illinois. The private laws amending the charter of said railway, requires the tax to be levied and collected as other taxes by them, in the town, city, etc. The town of Ohio is a township under the township organization of the State, under the law then in force, or that might be in force, when the tax was sought to be collected.

The law in force at the time the auditors of said town were commanded to audit the sum set forth in the petition herein. Revised Statutes of 1874, page 1081. The duties of town auditing boards are set forth, by Sec. 4, same page. They are required to *examine* and audit all charges and claims against the town. By Sec. 5, it is provided that "*rejected*" accounts shall be delivered to the town clerk.

Here are two words—examine and reject—which if taken in their well accepted signification, implies discretion, to be exercised by the town board. While it is true that it is to be presumed that a Court, particularly a Court of the General Government, knows as to whether or not, a judgment has been properly rendered, and while it would be a subsisting town charge, it could have no more force with the auditors in compelling them, simply because the claim was a judgment, to audit,

than that of a judgment of a justice of the peace, providing the auditors have the discretion to examine and reject.

The petition, page 5, Record, prays that the Court compel the auditors to audit the amount of the judgment, to certify the amount so audited to the town clerk, and cause a statement of the amount to be certified to the County clerk, and by him extend the same on the collector's book of the town.

Here we have a command to not only audit, but to collect a tax in a manner not authorized by law. The auditors had the discretionary power to say the judgment is a town charge. The statutes of the State provide that it must not be collected in that way, but by the act of April 10th, 1869.

In the act of March 25, 1869, authorizing aid to be voted by towns, etc., but one way was provided to pay interest and bonds. That way was pointed out in the township organization laws, viz: auditing and certifying the amount to be raised to the county clerk, but *afterwards* to-wit: on the 10th day of April, 1869.

The General Assembly provides, Revised Statutes, 791, for a different mode, by Sec. 4 and 6, page 793, of said act, fully sets forth the manner by which the tax to pay such bonds, or interest, shall be collected.

Such was the law when the bonds in question were issued by the town, and was the law when this proceeding was commenced, and is now a part of the law of this State.

The answer filed herein, sets forth that the bonds and coupons, were upon their face payable at the office of the State Treasurer, in Springfield, in said State. This is admitted by the demurrer. It is also admitted by the demurrer that the bonds in question were registered in the auditor's office, in Springfield, before the same were put in circulation, and before the same were placed in the hands of the Illinois Grand Trunk Railway.

It may be true that the town officers of the town of Ohio, were not required to have the bonds registered in the auditor's office, and if they have not been registered they would have—principle and interest—been collected, by virtue of the township organization laws of the State. But having registered them, the auditor printing on their face that they were

so registered. by virtue of the Funding act, it made them payable only in that way. When the bonds were placed on the market by the Illinois Grand Trunk Railway, the purchaser had notice as to the manner of their payment—both coupon and bond.

The answer states that a portion of the tax of the year 1873, as interest on the bonds, was received by the relator, at the State Treasurer's office.

The answer fully sets forth that the relator has another remedy to secure the payment of his coupons. The law of the State requires that he shall adopt that remedy. The very foundation of this proceeding is, that the relator has no adequate remedy at law other than by *mandamus*, and while the petition sets forth, Record, page 5, second paragraph, that by reason of the auditors neglecting and refusing to audit the amount of the judgment, the petitioner has been unable to obtain the necessary levy and collection of taxes.

It does not set forth that the tax had not been collected in the usual way, by virtue of the Funding law of 1869, but admits that he received a portion of the tax for the year 1873, from the State Treasurer. Why he did not collect the balance, or that it was not collected, or the reason for its non-collection, is not set forth. No reason is given why the remedy through the auditor and State Treasurer is not full and complete.

On the other hand the answer—which is taken as true—does state that the tax must be collected in that way. It is no answer to say that the form of the indebtedness has been changed.

That the relator seeks merely to collect, by this proceeding, a judgment. The petition, if it had set forth that fact alone, the respondents, perhaps, could not have presented the defense which they do, by their answer. The petition herein, Record, page 3 and 4, represents the cause of action upon which the judgment was rendered, thereby opening to respondents the right to show that the tax sought to be collected, must be received through the State, and not through the town auditors.

The law is well settled in the Federal and State Courts, that it must be in the power of the party, and his duty also, to do the act sought to be done.

The People *v.* Hatch, 33 Ills. 9.

The People *v.* Mazn, of Chicago, 51 Ills. 17.

State *v.* Beloit, 21 Wis. 250.

III

If in the judgment of this Court the auditors are legally required to audit the judgment in question, the question arises as to when this duty can be enforced. That the auditors should have allowed the claim as a town charge, may be conceded, yet the peremptory writ requires respondents to do an act, which, under the township organization laws of the State, they cannot do. The Circuit Court may have the undoubted right to say by its writ, "you must act," but cannot say the thing to be performed shall be at any other time than that fixed by law.

A township exists only by force of the statute. It is the mere creation of the law; it and its officers possess only such powers as the charter, by its creation, confers upon it and them.

Trustees, etc., *v.* McConnel, 12 Ill. 138.

To the statute, corporations such as townships, owe their creation, and the statute confers upon them all the powers which they possess, prescribes all the duties which they owe, and imposes all the liabilities to which they are subject.

Soper *v.* Henry Co., 26 Iowa 264.

The prescribed duties of town auditors are found in Article 13, of the Township laws, Revised Statutes, 1874, page 1081, Sec. 3: "Said board of town auditors shall meet at the town clerk's office for the purpose of examining and auditing the town accounts, semi-annually." By Sec. 4, the auditors shall at the same time and place, as stated in Sec. 3, audit all charges and claims against their town.

By virtue of these two Sections the board of town auditors can meet *semi-annually*, and at no other time. The statute is the only chart —it must be obeyed. For a Court to say that they must meet at some other time, is not interpreting, but legislating.

The peremptory writ in this case, Record 22, commands the respondents to meet *forthwith* as a board of auditors and audit the judgment. If a writ was properly issued, or a case made, it is undoubtedly defective in commanding respondents to meet at a *time* unauthorized by the statute.

It should have directed the board to assemble at their next regular semi-annual meeting and allow said judgment.

but that the law is peremptory, and if so the act to be done, must be at the specified time.

Webster *v.* French, 12 Ills. 302.

In this case the peremptory *mandamus* commands that the auditors meet *forthwith*. The General Assembly of this State say *semi-annually*. The writ cannot be obeyed. To audit the judgment at a meeting unauthorized by law, would confer no authority on the County Clerk to extend a tax for its collection.

The defendant in error claims that by law the town of Ohio contracted a debt by issuing bonds to the Illinois Grand Trunk Railway. By law he received a judgment which should be paid. We insist that if the auditors were in duty bound to pass upon the judgment in question, that by law they cannot meet *forthwith*, and for this reason—if for no other—the judgment of the Circuit Court should be reversed.

J. J. HERRON,
T. LYLE DICKEY,
For Plaintiffs in Error.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1875.

SAMUEL B. LOWER, SUPERVISOR, ALLEN S. WALTERS, THE TOWN CLERK, AND S. B. LOWER AND P. F. REMSBURG, THE JUSTICES OF THE PEACE OF THE TOWN OF OHIO,
Plaintiffs in Error,
v.
UNITED STATES OF AMERICA, EX REL., GEORGE O. MARCY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE O. IDE,
For Defendant in Error.

CHICAGO:
BULLETIN PRINTING COMPANY, 132, 134 & 136 Monroe St., cor. Clark.
1876.

Supreme Court of the United States

OCTOBER TERM, A. D. 1875.

SAMUEL B. LOWER, SUPERVISOR, ALLEN S. WALTERS, THE TOWN CLERK, AND S. B. LOWER AND P. F. REMSBURG, THE JUSTICES OF THE PEACE OF THE TOWN OF OHIO,
Plaintiffs in Error,
v.
UNITED STATES OF AMERICA, EX REL., GEORGE O. MARCY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

The question in this case arises upon a demurrer to an answer, filed by the plaintiffs in error in the Circuit court, to the petition of defendant in error for a writ of mandamus to enforce the collection of a judgment. The demurrer having been sustained by the Circuit court and the defendants electing

to stand by their demurrer, judgment was rendered on the demurrer and an order for a peremptory writ entered, to reverse which findings this writ of error is prosecuted.

The procedure in this case as to the form of pleadings and form of judgment, is in conformity with the statute of Illinois concerning "mandamus" (Revised Statutes of Illinois, p. 690), in force July 1st, 1874. This statute dispenses with any alternative writ, substituting the ordinary process of summons therefor, and providing that cause why a peremptory writ should not be issued shall be shown by answer to the petition; that the petitioner may demur or reply to the answer, and that on judgment upon the demurrer for the petitioner he may recover his costs, and that a peremptory writ may be granted.

On the 5th day of March, 1875, Geo. O. Marcy filed, in the Circuit court for the northern district of Illinois, his petition for a writ of mandamus against the plaintiffs in error, alleging that, on March 12th, 1873, he recovered in said court a judgment at law against the town of Ohio, in said district, for $4,286.60 damages and $228.70, his costs of suit. (Printed record, p. 2.)

That said town is, and ever since the year 1850, had been a municipal corporation created and existing under the township organization laws of Illinois. (Record, p. 3.)

That by the revised township law, in force March 4, 1874, the supervisor, town clerk and justices of the peace of each town shall constitute a board of auditors, which shall consist of at least three persons, and that it shall be the duty of said board to meet at the town clerk's office for the purpose of auditing town accounts and charges, semi-annually, on the

Tuesday next preceding the first Tuesday in April, and on the first Tuesday in September. (Record, p. 3.)

That by Section 6 of Article 5 of said law, judgments against the town are made town charges; and, by Article 13, it is made the duty of said board of auditors to examine and audit all town charges against their town, and to make a certificate to be signed by them, showing the nature of the claim allowed, its amount and to whom allowed, and to cause such certificate to be filed with the town clerk, for the purpose of having the same certified to the county clerk of the county, in order that the amounts certified may be by him levied and collected by taxation, in the manner prescribed by the revenue laws of the State. (Record, p. 3.)

The petition further shows, that the judgment was rendered upon certain coupon notes of the town of Ohio, representing annual interest on the bonds of that town, issued under a law of Illinois, entitled "An act to amend an act entitled 'An act to incorporate the Illinois Grand Trunk Railway,'" in force March 25th, 1869; and that by the second section of said law it is provided as follows:

"It shall be the duty of the proper authorities of any city, town, or township issuing bonds, as aforesaid, to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing thereon; and to levy such taxes as may be necessary therefor, as other taxes are levied by them." Illinois Private Laws of 1869, vol. 3, p. 308. (Record, p. 4.)

The petition and an amendment thereto (Record, pp. 4–9) show that on September 1st, 1874, the board of auditors of

the town of Ohio, consisted of the plaintiffs in error, as the supervisor, town clerk, and justices of the peace of that town; that on that day the said judgment and costs remaining unpaid, less $1,500 then received and credited, Marcy demanded of said board of auditors, and each member thereof, that they should audit and allow the balance of his judgment and costs with interest, at their semi-annual meeting on the first Tuesday in September, 1874, and take the necessary steps to allow and have the same certified to the town clerk of Ohio, so that provision might be made for the payment thereof, according to the township organization and revenue laws of Illinois; and that they should also comply, at the same time, with the provisions of section two of the law of March 25, 1869, set forth above; and that at the time of making this demand he furnished said board with a duly certified copy of said judgment and a sworn statement of his claim. (Record, p. 4.)

That this demand was not fully complied with, but evaded, the board auditing only $800 of the balance due on the judgment, without any legal excuse for so evading their duty; that it was the duty of said supervisor, town clerk and justices to have met as a board of auditors, on the first Tuesday in September, 1874, and to have allowed and certified, as aforesaid, to the balance of petitioner's judgment, then amounting in all to $3,388.63; that this balance is still due and unpaid, and that by reason of the refusal of said officers, the petitioner has been and is unable to obtain the necessary levy and collection of taxes in said town in order to satisfy said balance; that no provision or levy of taxes whatever has been made by said town to pay said judgment, nor has said town appropriated any funds for such purpose; and that petitioner has

no adequate remedy at law other than by mandamus. (Record, p. 5.)

The petition prayed that said officers, the plaintiffs in error, be summoned to appear and show cause why a peremptory writ of mandamus should not issue against them, commanding them to meet as the board of auditors of the town of Ohio, on the last Tuesday in March, 1875, being the Tuesday preceding the annual town meeting, and audit and allow the said balance, less said sum of $800, and certify the same as required by the township organization law and to do such other acts in the premises as the law requires. (Record, pp. 5–6.)

THE ANSWER.

On March 30th, 1875, the plaintiffs in error appeared and filed in said court their answer to the petition, admitting all the substantial allegations of the petition, but setting up:

1st. That Remsburg, one of the defendants, was a justice of the peace of said town on the first Tuesday of April, 1874, was then re-elected but had not qualified under his second election. (Record, p. 13.)

2d. That the auditors, at the semi-annual meeting, on Sept. 1st, 1874, allowed $871.78, instead of only $800, on said judgment and costs, leaving a balance of $2,516.85 on the judgment unaudited and unprovided for.

3d. That the bonds and coupons on which the judgment was rendered were payable at the State treasurer's office in Springfield, Illinois; that they had been registered with the

State auditor, under an act of the State entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16th, 1869, and that the means for the collection and payment thereof, or of judgments rendered thereon, are fully and solely prescribed by the provisions of said act.

4th. That believing the petitioner was entitled to the face of his coupons at the hands of the State treasurer, the auditors of Ohio audited and allowed $871.78 only for the interest on the judgment and interest on coupons included in the judgment, and for the costs of suit. (Record, pp. 15–16.)

5th. That the merging of the coupons into the judgment does not change their character nor the mode of collecting the same, and that the judgment is not a town charge within the meaning of Section 6, Article 5, of the Illinois township law. (Record, p. 16.)

To this answer the petitioner demurred, assigning that the allegations in the answer were not sufficient in law to excuse the defendants from the performance of the duty alleged in the petition, nor to require petitioner to reply. (Record, pp. 16–17.)

On April 8th, 1875, the court sustained the demurrer and entered judgment thereon (defendants taking no further steps), and finding, from the petition and answer, that there remained unaudited of said judgment and costs by said board of auditors, on Sept. 1st, 1874, a balance of $2,516.85 (the amount admitted by the answer), entered judgment for costs against the respondants and awarded a peremptory writ of

mandamus, requiring the board of auditors to audit and allow the above unaudited amount of the judgment, with interest from Sept. 1st, 1874, and that they should so certify as required by the township law. (Record, pp. 19, 20, 21, 22.)

The errors assigned are, that the court erred in sustaining the demurrer to the answer, and in entering judgment thereon.

BRIEF.

I.

The answer to the petition admits the substantial facts set up in the petition; the recovery of a judgment against the town of Ohio in favor of the petitioner; a demand on the board of auditors of that town to audit and allow the unpaid balance of the judgment, as a preliminary and necessary step to the levy of taxes to pay the same; the refusal and neglect of the auditors to comply with the petitioner's demand in full, and the fact that the town of Ohio is governed by the provisions of the Illinois township law, which prescribes the duties and imposes upon the board of auditors the obligation to audit judgments against their town as town charges.

The provisions of the Illinois township organization law, touching this question, are as follows:

Article 5, section 6, says: "* * * judgments re- "covered against a town, or against town officers in actions "prosecuted by or against them in their name of office, shall "be a town charge, and when collected, shall be paid to the "person or persons to whom the same shall have been ad- "judged."

Revised Stat. Illinois, p. 1074, section 50.

THE BOARD OF TOWN AUDITORS.

"SEC. 1. In each town the supervisor, town clerk and

"justices of the peace of the town shall constitute a board of "auditors; said board shall consist of no less than three per- "sons, and each person shall cast but one vote."

"SEC. 2. In case of the absence of any or either of the "said officers, or their failure to attend any meeting of the "board, those attending may associate with them the collector "or assessor of the town, or both, in the place of any ab- "sentee or absentees, as the case may be, who shall act for "the time being as members of such board."

"SEC. 3. Said board of auditors shall meet at the town "clerk's office, for the purpose of examining and auditing the "town accounts, semi-annually, on the Tuesday next preced- "the annual meeting of the county board, and on the Tues- "day next preceding the annual town meeting."

[The annual meeting of the county board is required to be held on the second Tuesday in September, in each year (See, Rev. Stat. p. 311, Sec. 49); and the annual town meeting occurs on the first Tuesday in April. Rev. Stat., p. 1074, Sec. 51.]

"SEC. 4. The board of auditors shall, at the same "time and place as stated in Section 3, examine the accounts "of the supervisor, overseer of the poor (where the town "sustains its own poor), and the commissioners of highway sof "such town, for all moneys received and disbursed by them, "and shall also *examine and audit all charges and claims* "*against their town*, and the compensation of all town officers, "except the compensation of supervisors for county services.

"SEC. 5. The accounts so audited, and those rejected, "if any, shall be delivered, with the certificate of the auditors,

"or a majority of them, to the town clerk, to be by him kept "on file for the inspection of any of the inhabitants of the "town. They shall also be produced by the town clerk at the "next annual meeting, and shall be there read by him.

"SEC. 6. The board of auditors may require any amount "presented, to be verified by affidavit, setting forth that the "same is correct and just, and is unpaid, or, if any part thereof "has been paid, setting forth how much.

"SEC. 7. The board shall make a certificate, to be "signed by a majority of the said board, specifying the nature "of the claim or demand, and to whom the amount is allowed, "and shall cause such certificate to be delivered to the town "clerk of said town, to be by him kept on file for the inspec-"tion of any of the inhabitants of said town; and the aggre-"gate amount thereof shall be certified to the county clerk at "the same time, and in the same manner as other amounts re-"quired to be raised for town purposes, which shall be levied "and collected as other town taxes."

"SEC. 9. The moneys necessary to defray the town "charges of each town, shall be levied on the taxable property "in such town, in the manner prescribed in the act for raising "revenue for State and county purposes and expenses."

Rev. Statutes, pp. 1081, 1082, in force March 4th, 1874.

The principal excuse set up in the answer for not auditing the unpaid balance of the judgment is, in substance, that the mode prescribed by law for the collection of this judgment, is through the ways and means furnished by the "Funding Act" of Illinois, of April 16th, 1869, and that, there-

fore, the town of Ohio is not in duty bound to provide, under the provisions of the township organization and revenue laws of Illinois, which laws govern and control that town, for the payment of this judgment by the levy of a town tax.

This is, in effect, saying that this judgment is exceptional, and does not stand on the same footing as to the mode of collection, with all other judgments rendered against the town. It seems to be admitted, and cannot be denied, that all ordinary judgments against the town of Ohio are town charges, are subject to be audited by the town board of auditors, and can be collected under the township and revenue acts referred to, in the same manner as has been followed by the petitioner in this proceeding; and that for a neglect to audit a judgment, on the part of the auditors, they can be compelled to do so by mandamus.

In what respect the judgment, in this case, differs from any other judgment, does not appear from the record. Certainly, in its form it does not differ from ordinary judgments, and there is no provision in it requiring its collection in any peculiar or different manner from that followed in other instances.

The practical tendency of the excuse set up, is to refer the collection of this judgment to an officer of the State, and to relieve the town, the party against whom the judgment was rendered, from any responsibility for its payment.

There is no provision, however, in the "funding act," relied on by plaintiffs in error, authorizing the State auditor to levy a tax to pay a judgment which has been rendered on bonds or coupons registered with him, nor has the State treas-

urer any authority to pay any such judgment out of moneys in his hands.

The general result, if the position of the plaintiffs in error be tenable, then, would be to prevent entirely the collection of this judgment, and to render the Federal Circuit court powerless to compel its payment by mandamus. For if the town is not obliged to pay the judgment against it through local taxation, as is averred in the answer, neither can the State auditor be compelled to levy the requisite taxes for that purpose, for there is no duty imposed upon him to do so in the "funding act," nor is any such duty incidental to his office under the laws of Illinois.

It will be noticed that the answer does not allege that any tax has been levied by the State auditor for the purpose of paying this judgment, or the coupons on which the judgment was had; nor that any such tax is in process of collection, unrestrained and now available to the relator. It simply avers a duty on the part of the State auditor, but shows no compliance therewith.

Excuses set up in the answer to the petition should, like the return to an alternative writ—in the place of which, under the Illinois practice, the petition now stands—be certain and specific, and show, by facts well pleaded, that the petitioner has, under the "funding act," an adequate and complete remedy. Every intendment is made against a return, which does not answer the important facts.

People v. Kilduff, 15 Ill. 492.
People v. Ohio Grove, 51 Ill. 191.

The demurrer of course admits nothing to be true that is not well and specifically pleaded.

The action of the town auditors, as stated by them in their answer, in regard to their omission to audit the whole judgment, is, moreover, inconsistent with the view advanced by them as to their duty in the premises. They gravely state: "Believing that the petitioner was entitled to only the face of his coupons, to wit, $4,000, at the hands of the State treasurer, they audited and allowed said sum of $871.78, being for interest on the judgment, the $286.60 of interest included in the judgment, and the costs of said suit." (Record, p. 15.)

According to their own theory, they admit that the State auditor could pay only the face of the coupons, leaving the balance of the judgment and the costs of suit beyond his authority to liquidate. This is a novel method of paying the judgment of a court against a municipal corporation. It is simply asking the plaintiff to commit the folly of removing from the files of the court the notes upon which he has obtained his judgment, and which, in theory, are merged in the judgment, and, in fact, marked canceled by the clerk of the court, and then of conveying these papers so canceled to the State treasurer to receive, if payable by him at all while in such condition, the amount of their face only, and next of applying to the local authorities for the payment of the remainder of the judgment and the costs. The absurdity of such a procedure illustrates the fallacy of the excuse set up in the answer.

The answer avers, "that the means for the collection and means of payment of bonds and coupons or judgments rendered thereon, are fully and solely prescribed by the provisions" of the funding act of April 16, 1869. (Record, p. 15.)

Counsel fail to point out a single provision of law justifying this assertion. No such provision relating to judgments can be found in the funding act. That act is too long to quote in full. It is found in Revised Statutes of Illinois, page 791, *et seq.* The first four sections provide a mode of collecting State taxes, and donating them to municipalities to aid them in payment of their railroad bond indebtedness—a scheme which has since been declared to be unconstitutional by the Supreme court of the State. The taxes, when collected, are, by the fifth section, to be applied to the payment by the State treasurer of the annual interest and principal of registered bonds, "on their *presentation* at the State treasury," "and on payment, or purchase of said bonds, the amount paid on the principal of the bonds, shall be indorsed thereon; and the interest coupons or bonds, when fully paid, shall be returned to the office of the State treasurer, and shall be canceled and destroyed in the same manner as those appertaining to the State debt." And section six provides that "in case of non-presentment of any such bonds or interest coupons for payment, at the time and place when and where the interest on the State debt is, or may be paid," the money undisbursed shall be carried to the credit of the fund to pay the interest of the ensuing year.

All this clearly shows that the coupons themselves are to be presented to the State treasurer before he can pay them, and that the provisions of this law are not applicable to judgments rendered on coupons. Neither is there anything in this law which is mandatory on the holder of such papers, so as to prevent him from enforcing their collection by suit in the usual way, and compelling the levy of taxes to pay the judg-

ment on the part of the municipality. This law impliedly sanctions the payment by a corporation of its bonds or coupons by local taxation, other than that imposed by the State officers, for section 10 provides that "on payment of any "such registered bond, or interest coupon, by the city or town "assessing the same, and presentation to the State auditor, "he shall cause due entry thereof to be made in his office." (Rev. Stat., p. 795.)

The supposed remedy, set up as an excuse in the answer, for not auditing is inapplicable to this case, and furnishes no defense.

1. Because there is no provision in the "funding act" for the payment by the treasurer of the State of *judgments*, nor any provision therein for the levy of a tax by the State auditor for the purpose of paying and satisfying the judgment of a court, although rendered upon registered bonds or coupons. The whole scope of the act is to provide a way of paying bonds and coupons, on presentation by the holder to the State treasurer. And it is not made his duty to pay unless such presentation of the papers themselves be made, in order that they may be taken up and canceled by him. The coupons in this case were merged in the judgment. The judgment remains as the claim against the town and the only debt owing by it. The coupons have no longer any vitality, cannot be taken from the files of the court, bear upon their face the file marks of the court, and thus have ceased to be the evidences of indebtedness recognized by the funding act.

2. Because, the judgment in question is, by the 6th Section of Article 5 of the Township Organization law, above

quoted, made a town charge; and by Article 13, Sec. 4, of the same law, it is made the duty of the board of town auditors to audit and allow such town charges, in order that they may be collected and paid through the usual means of local taxation. It cannot be disputed but that there is such a judgment in this case, and that the coupons were merged in that judgment, and therefore that this judgment is made by law a charge against the town of Ohio. Being such a town charge, the right to require its audit by the town anditors and to enforce its collection by taxation, in the mode pointed out by the township and revenue laws, necessarily follows.

3. Because, the law authorizing the issue of the coupons on which this judgment was rendered, expressly declared "that it shall be the duty of the proper authorities of the town issuing bonds as aforesaid, to make all necessary arrangements, and provide for the prompt payment of all interest and *other liabilities accruing thereon*, and to levy such taxes as may be necessary therefor, as other taxes are levied by them." (Private Laws of 1869, vol. 3.)

The proper authorities referred to are the board of auditors, and the duty is thus expressly imposed upon them to provide for the levy of taxes to pay "liabilities accruing," under which phrase judgments may be included.

This law gives the holder of the bonds and coupons of the town a cumulative remedy, in addition to that given in the funding act. It affords a remedy, which is a part of the contract, and as such cannot be affected by any subsequent legislation.

Von Hoffman v. City of Quincy, 4 Wallace, 535.

4th. Because the township law, in force March 4th, 1874, which provides for the collection of judgments against a town in the mode pursued in this proceeding, is a much later law than the funding act, and if it does not operate to repeal any implied provision of the funding act having any such effect as the answer would insist upon, at least affords a new and specific mode of enforcing the collection of the judgment through auditing and local taxation, which the court can compel to be done by the town authorities.

Again, even if this funding act permitted the payment of the judgment from the taxes levied by the State auditor, still it is but a cumulative remedy, and therefore the answer, in this respect, presents no defense to the collection of the judgment in the manner sought by the petition.

1. For the reason that in the mandamus statute of Illinois, above referred to, it is provided that "the writ of mandamus shall not be denied because the petitioner may have *another specific legal remedy* when such writ will afford a proper and sufficient remedy."

Rev. Stat. 1874, p. 692, Sec. 9.

2. Because the township law provides specifically for the auditing of town charges, among which judgments are embraced, and for the levy of town taxes to pay them.

3. As a general proposition, the bondholder may pursue either of three courses to recover his interest:

1. By mandamus in a State court to compel taxation under the act of March 25, 1869, under which law the bonds and coupons of the town of Ohio were issued, section two

making it the duty of the town authorities to levy taxes to pay the principal and interest as other taxes are levied by them.

Comm. v. Alleghany Co., 32 Penn. St. 218.

Comm. v. Pittsburgh 34 Penn. St. 496.

2. By presentation of the coupons to the State treasurer, when there is any money there to pay them under the funding act.

3. By judgment on the coupons in a court, and enforcing its collection by execution or mandamus, as the law of the State may regulate the enforcement of judgments, without regard to the cause of action on which the judgment was founded.

These are cumulative remedies and the petitioner may pursue either.

Anderson v. Hooke, 9 Ala. 704.

This has been so held in Wisconsin, in *State ex rel. Bushnell v. Gates, town clerk*, 22 Wisconsin, p. 210, a case very similar to the one at bar.

In that case, the law under which the bonds of the town were issued, made it the duty of the town authorities to assess and collect a tax to pay the coupons. It was held that after judgment, this could not be interposed to prevent the issue of a mandamus to compel the clerk to levy a tax under the general law to pay the judgment.

The Wisconsin Supreme court, on page 214 of the report, say: "The coupons have been merged in the judgment, and if any tax at all is assessed, it must now be assessed to pay the *judgment* and *not to pay the coupons*. To sus-

tain this objection now would be to deny the remedy altogether."

The same reasoning applies to the State auditor and treasurer in the case at bar. They deal alone with bonds and coupons, and not with judgments rendered thereon. It is not their duty, under the funding act, to provide for the payment of judgments against the town.

The reasoning of the Wisconsin case has been approved by this court in *Morgan v. Town Clerk*, 7 Wallace, 610–613.

In the latter case it is held: "That a provision in a stat-
" ute, under which a town issued its bonds to a railroad, that
" a tax, requisite to pay the interest on these bonds, should
" be levied by the *supervisors* of the town, is not exclusive of
" the right in the *town clerk* to levy the tax under a general
" statute making it his duty to pay all debts of the town."

And in the same case this court further said, that there are several obvious answers to the view, that because there is a remedy by taxation through certain officers and under certain laws, it excludes a remedy by mandamus in the usual way. This court contented itself with one of these answers, viz: that given in the Wisconsin case cited above.

The same reasoning, it is suggested, applies with equal force to the position assumed in the answer of the plaintiffs in error, that the relator here must look to the State auditor of Illinois to levy a tax to pay his judgment.

There is nothing in the answer, nor in the provisions of the funding act, which shows that an action at law could not be maintained upon the coupons, and they reduced to a judg-

ment. It is only a mode or means of payment of the coupons that is set up, and not essentially of a kind to exclude resort to other means. And this mode, too, does not apply, as already contended, to the collection of a judgment rendered on the coupons. Whether it would amount to a defense to a suit, prior to judgment, is quite a different question. But, certainly, after the judgment it cannot avail to stop the collection of that judgment by the usual means.

The bonds and coupons are, it is true, made payable at the State treasurer's office, and they were registered there; but there is no requirement in the securities, nor in the law, requiring them to receive payment under the funding act. Hence the holders of bonds and coupons so registered are not bound, by law, to look alone to the State treasurer for payment of these securities.

If I understand the case correctly, this point has been so ruled by this court in *Town of Queensbury v. Culver*, 19 Wallace, pp. 92–93.

II.

It is claimed for plaintiffs in error that the Circuit court erred in ordering the board of auditors to meet *forthwith* and to audit the relator's judgment instead of ordering them to meet at the next semi-annual meeting six months later.

The case shows, that after a written demand to meet at the semi-annual meeting in September, 1874, the board evaded their duty, and compelled the relator to resort to his remedy by mandamus, to require them to discharge their duty. It has been frequently held that where public officers neglect to

perform their duty, at a time and place fixed by statute, such neglect cannot shield them, and they can be compelled to meet again and to discharge such duties, at a time not provided by statute.

Dillon on Municipal Corporations, Section 690, treating of this very subject, says: "If supervisors fail or neglect to perform their duty of levying a tax at the annual or regular meeting, mandamus will compel them to meet again and do their duty, the same as if it had been performed at the proper time and place, and this without any special legislative enactment."

"The excuse of inability to act, cannot avail when it is the result of their own acts."

High on Extr. Remedies, Sec. 14.

The allusion to the New York township law, as analogous, does not help the position of the plaintiffs in error; for the court of appeals in *People v. the Supervisors of Chenango*, 8 N. Y. p. 318–330, holds:

"The next objection raised is, that the board of supervi-
"sors had no power over the subject, except at their annual
"meeting, and as they omitted to do their duty then, it is con-
"tended they cannot be compelled to do it any other time
"without the aid of a special act of the legislature. This
"position is untenable. * * * Their neglect to
"perform their *duty* at the time required, cannot nullify the
"statute. They, or their successors, are bound to do what
"was required, and on failure to perform it may be compelled
"by mandamus. * * * The omission to do their
"duty at the proper time, though it has thrown some embar-

"rassments in the way, does not render a substantial compli-
"ance with the statute impossible. The supervisors, or the
"successors of those in office, can be convened, and can issue
"their warrant for the commutation tax. The mandamus was
"a proper way to compel them to proceed."

Again, there is no such error as this assigned in the formal assignment in the record nor in the counsel's brief, as directed by rule 4 of this court. Can such an error, if it be one, be assigned by mere suggestion of counsel in his argument, under the provisions of that rule?

III.

The brief of the plaintiffs in error lays stress upon the point that relator's right to the writ of mandamus must be clear, and that he must have no other remedy at law.

The brief, however, points out no other remedy at law for the collection of this judgment; and the citations of authorities, made prior to the enactment of the present mandamus act of Illinois, lose some of their force under the language of that act, since it is provided therein that "the *writ shall not be denied* because the petitioner *may have another specific legal remedy*, where such writ will afford a proper and sufficient remedy." (See Rev. Stat. p. 692, Sec. 9.)

The duty too, to audit, is not discretionary in the sense of defeating a peremptory writ. The amount of the judgment has been ascertained by the court and the auditing is purely ministerial. This has been often and universally so held.

High on Ex. Remedies, p. 81, 277, 284.
Dillon on Mun. Corp., Secs. 669, 685, 686, 689.

Supervisors v. U. S. ex rel, 4 Wallace 435.
City of Galena v. Amy, 5 Wallace 705.
City of Olney v. Harvey, 50 Illinois 456.

Mandamus is a proper remedy to compel *town auditors* to audit a claim against a town.

People ex rel v. Town Auditors, 53 Barbour 555.
Same case, 38 Howard Prac. Reports 23.

Nor will it avail to assert that the judgment in question is not a town charge, and hence it does not clearly appear that it is the duty of the town auditors to audit the judgment. The responsibility of the plaintiffs in error cannot be so evaded.

In Illinois an execution cannot issue for the collection of a judgment against a municipal corporation. The only remedy is to require the corporate authorities to levy a tax to pay the judgment.

City of Chicago v. Halsey, 25 Ill. 595–598.
Elrod v. Town of Bernadotte, 53 Ill. 374.
Town of Odell v. Schroeder, 58 Ill. 353.

Under the township and revenue laws of Illinois, in order to levy and extend taxes, there must be certified to the county clerk, by the proper authorities, the amount of money required to be raised by taxation. (Rev. Stat. p. 878, Sec. 122.) The officer, in the case of a township, who so certifies, is the town clerk. (R. S., p 1081, Sec. 115.) But before he can certify, a certificate must be made and filed with him by the town auditors, showing the nature of the claims, charges and demands audited by them, and it is the aggregate of these allowances that the town clerk certifies upon for taxation. (R. S., p. 1081, Sec. 124.)

He is required only to certify what the corporate authorities have audited. This is the intention of the statute, that the auditing shall be done by the board.

By Sec. 121, p. 1081, it is made the *duty* of the board of auditors to *examine* and *audit all charges* against their town, except certain compensation of certain officers, which is payable out of the county treasury in another mode.

Sec. 125, p. 1082, R. S., specifies what *charges* against a town are, and by Section 50, p. 1074, a *judgment* against a town is expressly called and made a *town charge*.

Hence, a judgment against the town being a town charge, by the statute itself, and it being the *duty* of the board of auditors to audit *all* town charges, and the plaintiffs having admitted that they are the officers constituting the board, and the thing which they were demanded to audit in this case being a judgment against their town, it follows that it was and is the *duty* of plaintiffs in error to audit the judgment of the relator in this case.

Auditing the judgment does not mean that the auditors are to pass upon and judge of its validity, nor to question it in any sense, but to receive the evidence of its existence, and if the same has not, since its rendition, been paid, or released, to provide for its payment by taxation in the mode pointed out by the township law.

It will not do for plaintiffs in error to argue that the town auditors have nothing to do with the judgment, since there may, possibly, arise questions as to whether the whole, or some part thereof, has not been already paid by taxation, and

to whom does this question belong to decide, if it does not to the auditing officers of the town? They are the "corporate authorities" of such a municipality, as held in *C. D. & V. R. R. Co. v. Smith*, 62 Illinois, 268, and empowered to levy taxes for the payment of the debts of the town. But, at all events, the statute of Illinois imposed upon them the duty of auditing and allowing the judgment in question.

Hence, I insist that the position of plaintiffs' counsel, that this board does not audit judgments, because the court in rendering the judgment has audited the claim on which the judgment is based, is not well founded. The court audits the claim, but it does not audit the judgment. That is for the town auditors to do, in order to provide the means to pay the judgment by taxation.

IV.

There is no force in the objection made in the answer, that Remsburg, a justice of the peace of the town holding over, had not qualified under his second election.

First, for the reason, that there were three auditors—a sufficient number to constitute the board, and to enable it to act, under the statute quoted, without including him, and his absence or disqualification, if any, therefore did not justify the other members of the board of auditors in not proceeding to audit.

Second, because Remsburg was, in fact a justice, and a member of the town board until his successor was qualified. The township law, in this regard, is explicit, and reads:

"Town officers, except as otherwise provided, shall hold

their offices for one year, and until others are elected and appointed in their places, and are qualified."

Ill. Rev. Stat. p. 1078, Sec. 92; p. 637, Sec. 1.

If any point is made concerning the variance between the petition and the finding of the court, as to the amount remaining unpaid and unaudited on the judgment, the reply is, that the objection is purely technical and immaterial, since the finding of the court is for the amount admitted by the answer, and no prejudice has been done to the plaintiffs. The objection falls within the rule laid down by the court in

Railroad Co. v. Lindsay, 4 Wallace, 656.

Pugh v. McCormick, 14 Wallace, 374.

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